

OPINION
68-2

January 23, 1968 (OPINION)

Mr. C. R. Krogstad

Dairy Commissioner

RE: Agriculture - Filled Dairy Products - What Constitutes

This is in reply to your request for an opinion of this office with regard to application of rules and regulations governing Filled Dairy Products to certain products hereinafter described.

You identify the first product concerned as a product processed from 3.0 percent imitation fat, (namely, vegetable oil or imported coconut oil), 9.66 pounds of solids, not fat (skim milk powder), the emulsified content being .23 percent (twenty-three hundredths percent). Water is added to make a 100 percent product. You inform us that this product is sold as a beverage in the milk case, but does not use the name of milk and that this can be labeled "imitation or filled milk."

You identify the second product as a product to be introduced by a corporate entity under a name apparently invented for the product. The product contains sodium caseinate, a protein derivative of milk, and coconut oil replacing butterfat in real milk. Other nutrients are added. The corporate entity, intending to introduce this product, apparently maintains that this is a straight synthetic product and that it will not clash with the filled milk laws of North Dakota.

The statutory definition of filled milk products relevant would appear to be section 4-18B-02 of the North Dakota Century Code which provides:

DEFINITIONS. Whenever used in this chapter:

1. The term 'person' includes individuals, firms, partnerships, associations, trusts, estates, corporations, and any and all other business units, devices, or arrangements.
2. The term 'filled dairy products' means any milk, cream, or skimmed milk, or any combination thereof, whether or not condensed, evaporated, concentrated, frozen, powdered, dried, or desiccated, or any food product made or manufactured therefrom, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat so that the resulting product is in imitation or semblance of any dairy product, included but not limited to, milk, cream, sour cream, butter cream, flavored milk or skim milk drink, dried or powdered milk, cheese, cream cheese, cottage cheese, creamed cottage cheese, ice cream mix, sherbet, condensed milk, evaporated milk, or concentrated milk; provided, however, that this term shall

not be construed to mean or include:

- a. Any distinctive proprietary food compound not readily mistaken for a dairy product, where such compound is customarily used on the order of a physician and is prepared and designed for medicinal or special dietary use and prominently so labeled;
- b. Any dairy product flavored with chocolate or cocoa, or the vitamin content of which has been increased, or both, where the fats or oils other than milk fat contained in such product do not exceed the amount of cacao fat naturally present in the chocolate or cocoa used and the food oil, not in excess of .01 per centum of weight of the finished product, used as a carrier of such vitamins; or
- c. Oleomargarine."

Section 4-18B-03 of the North Dakota Century Code provides:

PROHIBITED ACTS. It shall be unlawful for any person to manufacture, sell, exchange, transport, possess, or offer for sale or exchange any filled dairy product."

We find in 36A C.J.S. 849, 850, Food Section 15 the following:

Valid statutes or ordinances relating to the purity or quality of milk or milk products are given effect to the extent, and only to the extent, that, as properly construed, they are applicable. This is true of statutes or ordinances which prohibit the adulteration of milk and define adulteration, as by the addition of a foreign substance; are directed against 'filled milk' or milk to which any fat or oil other than milk fat is added; prescribe a standard of pure milk, as that it shall contain a certain percent of butter fat, or a certain percent of solids, or not more than a certain percent of water or fluids, and provide that all milk falling below this standard shall be deemed to be adulterated; prohibit the sale, or possession with intent to sell, as pure milk or otherwise than as skimmed milk, of milk from which the cream or any part thereof has been removed; make an exception to a prohibition of the manufacture of cheese from milk from which any of the fat originally contained therein has been removed; regulate distribution or the source of supply; impose requirements as to pasteurization of milk or milk products; or require the grading of milk and cream obtained from producers for any commercial use or purpose. * * * ."

We appreciate also you forwarding to us a digest of recent filled milk and imitation dairy products decisions from the law offices of Fistere and Habberton which appears to cover quite thoroughly the material considered therein.

We have noted also the case of State v. Armour & Co., 27 N.D. 177, 145 N.W. 1033, L.R.A. 1916 E, 380 Ann. Cas. 1916 B, 1149, judgment affirmed (1916) Armour & Co. v. State of North Dakota, 36 S.Ct. 440,

240 U.S. 510, 60 L.Ed. 771 Ann. Cas 1916B, 548.

This is an older case than those considered by Mr. Fistere of the firm of Fistere and Habberton decided by the Supreme Court of this state in 1913, and on rehearing in 1914, and by the Supreme Court of the United States in 1916. While it deals with a statutory requirement that:

Every lot of lard or of lard compound or of lard substitute, unless sold in bulk, shall be put up in pails or other containers holding one (1), three (3), or five (5) pounds net weight, or some whole multiple of these numbers, and not any fractions thereof. * * * ."

In a case where a container containing two pounds and six ounces of lard was sold, the principles announced by the Court and the conclusion reached seem substantially in accordance with the above statement from C.J.S. and in the cases presented by Mr. Fistere's digest. While possibly not directly relevant to the questions at hand the Armour case does consider quite thoroughly utilization of the Act and its purposes and includes the objective of preventing the opportunity for fraud in the sale of articles of food. This purpose does seem quite close to the principle contended for by the defendant in the Coffee-Rich, Inc., etal, v. Michigan Department of Agriculture, 135 N.W.2d., 594, that the legislative purpose was to prevent fraud and deception through passing off of "imitation cream" as cream, half and half, or milk, and the point made by the Massachusetts Supreme Judicial Court in Aeration Processes, Inc., etal v. Commissioner of Public Health of the State of Massachusetts, etal, 194 N.E.2d. 838, to the effect that the Fourteenth Amendment to the Federal Constitution does not bar state action prohibiting the sale of an admittedly nutritious product as a measure within the police power aimed at avoiding consumer confusion. (emphasis supplied).

The Supreme Court in this state in the Armour case, previously mentioned, does call attention to the fact that the lard container there concerned did bear a label showing its weight to be two pounds and six ounces, but also did appear to give a great deal of emphasis to further consideration that this weight label was very inconspicuous comparing the size and condition of the weight label to the much greater size and emphasis placed on the Armour name and lard statement.

Looking to our statute, section 4-18B-02 of the North Dakota Century Code, we do note that proprietary food compounds to be excepted from the general provision of the statute are further delineated at some length as to such proprietary food compounds customarily used on the order of a physician prepared and designed for medicinal or special dietary use and prominently so labeled.

Looking to the first product you describe it appears to fall quite clearly within the definition of "filled dairy products" contained in section 4-18B-02, subsection 2. At least to the point where you inform us the product is sold as a beverage in the milk case, these would clearly appear to be the type of fraud on the consumer considered in the Armour case. Assuming that same bears the label,

"imitation or filled milk", further problems would arise, both as to the quality of the labeling - dependent on how conspicuous such labeling was and with regard to whether same is in "imitation or semblance" of any dairy product. Our Supreme Court in the Armour case definitely did decide that the two pound six ounce lard container was in violation of the statute requiring that the container hold one, three, or five pounds; however, the fact that they further carefully considered the conspicuousness of the weight label used certainly indicates an interest in this factor. Whether a label clearly and conspicuously describing the product as an imitation or filled product would take such product out of the prohibition of the statutory provision is a question our Supreme Court has not decided. The Carolene Products Co. v. United States Case, 323 U.S. 18, 65 S. Ct. 1, 155 ALR 1371, 89 L.Ed. 15, and the United States v. Carolene Products Co. Case, 304 U.S. 144, 58 S. Ct. 778, 82 L.Ed. 1234 considered in Mr. Fistere's digest would indicate that there is no constitutional inhibition against such statutes. Considering the precise wording of North Dakota statutes it would be our opinion that the appropriate labeling would not take the product out of the statutory prohibition.

The second product you mention presents more difficulty. If it qualifies under the exception denoted in subsection 2a of section 4-18B-02, there would be no question that it could be legally sold in this state. However, your letter while possibly indicating that same is a distinctive proprietary food compound does not mention whether it is or is not readily mistaken for a dairy product, whether such compound is customarily used on the order of a physician, and whether it is prepared and designed for medicinal or special dietary use. We do not find any decisions of the Supreme Court of this state that consider this problem nor do we find the Armour case of much help in this regard. A violation of the statute would necessarily depend on a finding that the product was: "in imitation or semblance of any dairy product." A conclusion on this point, assuming that such compound does not fall under the subsection a exception, would probably depend on the precise nature of the product as sold, and whether the sodium caseinate would be considered to be any milk, cream, or skimmed milk or any combination thereof, whether or not condensed, evaporated, concentrated, frozen, powdered, dried, or desiccated, or any food product made or manufactured therefrom." However, your letter does not mention whether such substance, sodium caseinate, is so used in the product you mention. Also, the courts of this State have not ruled on whether a functional ingredient intended to stabilize an emulsion is as a matter of law not a food product. The modern trend of decisions of the courts of other states does appear to indicate that products in the nature of synthetic products are not covered by filled or imitation dairy product statutes. Of the cases brought to our attention, however, we have not noted an instance where specific statutory provision is made for distinctive proprietary food compounds such as is contained in subsection 2a of section 4-18B-02 of the North Dakota Century Code. On such basis, we would be hesitant to arbitrarily rule that any proprietary food compound such as is described in the paragraph of your letter with regard to the second product, that does not fall within the exception contained in said subsection 2a, can be sold in this state.

HELGI JOHANNESON

Attorney General